

EXHIBIT 3

AD

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ENTERTAINMENT SOFTWARE
ASSOCIATION, VIDEO SOFTWARE
DEALERS ASSOCIATION, and
ILLINOIS RETAIL MERCHANTS
ASSOCIATION,

Plaintiffs,

vs.

ROD BLAGOJEVICH, in his official
capacity as Governor of the State of
Illinois; LISA MADIGAN, in her official
capacity as Attorney General of the State of
Illinois; and RICHARD A. DEVINE, in his
official capacity as State's Attorney of
Cook County,

Defendants.

FILED
LAL
AUG 23 2005
AUG 23 2005
MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

NO. 05C 4265

Judge Kennedy

DECLARATION OF JAIME BORASI

Pursuant to 28 U.S.C. § 1746, I, Jaime Borasi, under penalty of perjury state as follows:

1 I am currently employed as Senior Manager, Corporate Communications at Ubisoft Entertainment ("Ubisoft"). I have held this position since November 15, 2004. As a result of my duties as Senior Manager, Corporate Communications, I have personal knowledge of the facts stated in this declaration.

2. Ubisoft is a developer and publisher of interactive entertainment software both for personal computers and advanced entertainment systems, such as Microsoft Xbox, Sony PlayStation 2 and PlayStation Portable, and Nintendo GameCube, Game Boy Advance and DS. Ubisoft is a publicly traded company based in Paris, France.

3. One of the video games that Ubisoft designed is entitled "*Tom Clancy's Rainbow Six 3*." A true and accurate copy of the Xbox version of *Tom Clancy's Rainbow Six 3*, in its entirety and final form, is attached as Exhibit A to this Declaration. A videotape of *Tom Clancy's Rainbow Six 3* being played is attached as Exhibit B to this Declaration. I certify that Exhibit B is a true, accurate, and representative sample of *Tom Clancy's Rainbow Six 3*

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on August 15, 2005.



Jaime Borasi

**Exhibits A (video game "Tom Clancy's Rainbow Six 3") &
B (videotape of "Tom Clancy's Rainbow Six 3")
to the Declaration of Jaime Borasi
are enclosed in a separately filed envelope.**

D

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ENTERTAINMENT SOFTWARE)
ASSOCIATION, VIDEO SOFTWARE)
DEALERS ASSOCIATION, and)
ILLINOIS RETAIL MERCHANTS)
ASSOCIATION,)

Plaintiffs,)

vs.)

ROD BLAGOJEVICH, in his official)
capacity as Governor of the State of)
Illinois; LISA MADIGAN, in her official)
capacity as Attorney General of the State of)
Illinois; and RICHARD A. DEVINE, in his)
official capacity as State's Attorney of)
Cook County,)

Defendants.)

FILED

LAC

AUG 23 2005

AUG 23 2005

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

NO. 05C 4265

Judge Kennedy

DECLARATION OF BRAD CARRAWAY

Pursuant to 28 U.S.C. § 1746, I, Brad Carraway, under penalty of perjury state as follows:

1. I am currently employed as a senior global brand manager at THQ Inc. ("THQ"). I have held this position since July, 2004. As a result of my duties as a senior global brand manager, I have personal knowledge of the facts stated in this declaration.

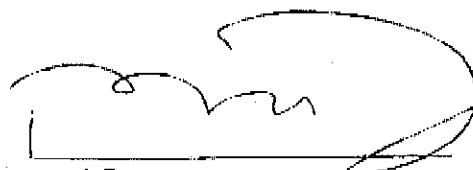
2. THQ is a developer and publisher of interactive entertainment software both for personal computers and advanced entertainment systems, such as Microsoft Xbox, Sony PlayStation 2 and PlayStation Portable, and Nintendo GameCube, Game Boy Advance and DS. THQ is headquartered in Los Angeles County, California.

3. One of the video games that THQ publishes is entitled "*Full Spectrum Warrior*."

A true and accurate copy of the Xbox version of *Full Spectrum Warrior*, in its entirety and final form, is attached as Exhibit A to this Declaration. A videotape of *Full Spectrum Warrior* being played is attached as Exhibit B to this Declaration. I certify that Exhibit B is a true, accurate, and representative sample of *Full Spectrum Warrior*.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on August 10, 2005.


Brad Carraway 8/10/05

**Exhibits A (video game "Full Spectrum Warrior") &
B (videotape of "Full Spectrum Warrior")
to the Declaration of Brad Carraway
are enclosed in a separately filed envelope.**

10

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FILED *LAL*

AUG 23 2005

AUG 23 2005

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

ENTERTAINMENT SOFTWARE)
ASSOCIATION, VIDEO SOFTWARE)
DEALERS ASSOCIATION, and)
ILLINOIS RETAIL MERCHANTS)
ASSOCIATION,)

Plaintiffs,)

vs.)

ROD BLAGOJEVICH, in his official)
capacity as Governor of the State of)
Illinois; LISA MADIGAN, in her official)
capacity as Attorney General of the State of)
Illinois; and RICHARD A. DEVINE, in his)
official capacity as State's Attorney of)
Cook County,)

Defendants.)

NO 05C 4265

Judge Kennelly

DECLARATION OF KEN CHAN

Pursuant to 28 U.S.C. § 1746, I, Ken Chan, under penalty of perjury state as follows:


1. I am currently employed as a marketing specialist at Sony Computer Entertainment America Inc. ("SCEA"). I have held this position since Spring 1996. As a result of my duties as a marketing specialist, I have personal knowledge of the facts stated in this declaration.

2. SCEA is a publisher, developer and distributor of interactive entertainment software. SCEA publishes video games for the PS one console, the PlayStation® 2 computer entertainment system, and the PSP™ (PlayStation® Portable). SCEA is based in Foster City, California, and serves as headquarters for all North American operations. SCEA is a wholly owned subsidiary of Sony Computer Entertainment Inc.

3. One of the video games that SCEA publishes is entitled "*God of War*." A true and accurate copy of the PlayStation 2 version of *God of War*, in its entirety and final form, is attached as Exhibit A to this Declaration. A videotape of *God of War* being played is attached as Exhibit B to this Declaration. I certify that Exhibit B is a true, accurate, and representative sample of *God of War*.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on August 09, 2005.



Ken Chan

**Exhibits A (video game "God of War") &
B (videotape of "God of War")
to the Declaration of Ken Chan
are enclosed in a separately filed envelope.**

JD

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ENTERTAINMENT SOFTWARE)
ASSOCIATION, VIDEO SOFTWARE)
DEALERS ASSOCIATION, and)
ILLINOIS RETAIL MERCHANTS)
ASSOCIATION,)

Plaintiffs,)

vs.)

ROD BLAGOJEVICH, in his official)
capacity as Governor of the State of)
Illinois; LISA MADIGAN, in her official)
capacity as Attorney General of the State of)
Illinois; and RICHARD A DEVINE, in his)
official capacity as State's Attorney of)
Cook County,)

Defendants.)

FILED

AUG 23 2005

AUG 23 2005

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

NO. 05C 4265

Judge Kennelly

DECLARATION OF REY JIMENEZ

Pursuant to 28 U.S.C. § 1746, I, Rey Jimenez, under penalty of perjury state as follows:

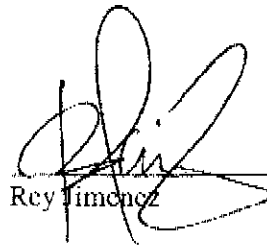
1. I am currently employed as an Associate Publishing Project Manager at Capcom Entertainment, Inc. ("Capcom"). I have held this position since May, 2003. As a result of my duties as an Associate Publishing Project Manager, I have personal knowledge of the facts stated in this declaration.

2. Capcom is an independent developer and publisher of interactive entertainment software both for personal computers and advanced entertainment systems, such as Microsoft Xbox, Sony PlayStation 2 and PlayStation Portable, and Nintendo GameCube, Game Boy Advance and DS. Capcom's headquarters in North America is located in Sunnyvale, California.

3. One of the video games that Capcom designed is entitled "*Resident Evil 4*." A true and accurate copy of the GameCube version of *Resident Evil 4*, in its entirety and final form, is attached as Exhibit A to this Declaration. A videotape of *Resident Evil 4* being played is attached as Exhibit B to this Declaration. I certify that Exhibit B is a true, accurate, and representative sample of *Resident Evil 4*.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on August 9, 2005.


Rey Jimenez

**Exhibits A (video game "Resident Evil 4") &
B (videotape of "Resident Evil 4")
to the Declaration of Rey Jimenez
are enclosed in a separately filed envelope.**

70

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ENTERTAINMENT SOFTWARE
ASSOCIATION, VIDEO SOFTWARE
DEALERS ASSOCIATION, and
ILLINOIS RETAIL MERCHANTS
ASSOCIATION,

Plaintiffs,

vs.

ROD BLAGOJEVICH, in his official
capacity as Governor of the State of
Illinois; LISA MADIGAN, in her official
capacity as Attorney General of the State of
Illinois; and RICHARD A. DEVINE, in his
official capacity as State's Attorney of
Cook County,

Defendants

NO. 05C 4265

Judge Kennelly

FILED
AUG 23 2005
MICHAEL W. DORRIS
CLERK, U.S. DISTRICT COURT

DECLARATION OF GENEVIEVE WALDMAN

Pursuant to 28 U.S.C. § 1746, I, Genevieve Waldman, under penalty of perjury state as follows:

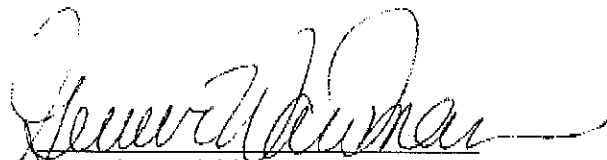
1. I am currently employed as Global Group PR Manager at Microsoft Corporation ("Microsoft"). I have held this position since October 2002. As a result of my duties as Global Group PR Manager, I have personal knowledge of the facts stated in this declaration

2. Microsoft is a publisher, developer and distributor of computer software, including interactive entertainment software. Microsoft publishes video games for play on personal computers, and for play on Microsoft's Xbox game console. Microsoft is a publicly traded company listed on the NASDAQ stock market. Microsoft is headquartered in Redmond, Washington.

3. One of the video games that Microsoft publishes is entitled "*Jade Empire*." A true and accurate copy of the Xbox version of the game, in its entirety and final form, is attached as Exhibit A to this Declaration. A videotape of *Jade Empire* being played is attached as Exhibit B to this Declaration. I certify that Exhibit B is a true, accurate, and representative sample of *Jade Empire*.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on August 9, 2005.



Genevieve Waldman

**Exhibits A (video game “Jade Empire”) &
B (videotape of “Jade Empire”)
to the Declaration of Genevieve Waldman
are enclosed in a separately filed envelope.**

TD

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ENTERTAINMENT SOFTWARE
ASSOCIATION; VIDEO SOFTWARE
DEALERS ASSOCIATION; and
ILLINOIS RETAIL MERCHANTS
ASSOCIATION,

Plaintiffs,

vs

ROD BLAGOJEVICH, in his official
capacity as Governor of the State of
Illinois; LISA MADIGAN, in her official
capacity as Attorney General of the State of
Illinois; and RICHARD A. DEVINE, in his
official capacity as State's Attorney of
Cook County,

Defendants.

No. 05 C 4265

FILED LAL

AUG 23 2005

AUG 23 2005

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

DECLARATION OF CROSSAN R. ANDERSEN

Pursuant to 28 U.S.C. § 1746, I, Crossan R. Andersen, under penalty of perjury state as follows:

1. I am employed as President of the Video Software Dealers Association (hereafter, "VSDA" or "the Association") and have been so employed since January, 1999. I previously served VSDA as its Senior Vice President and General Counsel and began my employment with VSDA in 1995. VSDA's principal offices are located in Los Angeles, California, where I reside.

2. I am admitted to practice in the State of California and the Commonwealth of Massachusetts. I have previously served as a Trial Attorney for the United States Department of Justice, Antitrust Division (1971-1980), and as an Assistant United States Attorney for the

Central District of California (1980-1988). During the period 1988 to July, 1995, I was employed as counsel to the Motion Picture Association of America.

3. The VSDA was established in 1981 as a not-for-profit trade association for the home entertainment industry. The Association represents more than 1,000 companies throughout the United States, Canada, and other nations. Its members operate thousands of retail outlets in the United States that sell and/or rent DVDs, VHS cassettes, and console video games. VSDA's membership comprises the full spectrum of movie video and video game retailers (from single-store retailers to large chains), video distributors, the home video divisions of major and independent motion picture studios, and other related businesses that constitute and support the home video entertainment industry. Membership of the Association includes a number of retailers and retail stores that sell or rent console video games within the State of Illinois and within the Northern District of Illinois. As explained more fully below, these VSDA members would have standing in this matter to seek judicial relief in their own right.

4. As President of VSDA, I am called upon to represent VSDA and the retailing of home entertainment, including console video games and other packaged video products. This regularly includes representation in consumer and trade media, at conventions and other trade events and before federal and state governments and international trade organizations. I have personal knowledge of the facts stated in this declaration.

5. In my capacity as President of VSDA, I have remained informed concerning the issues and process concerning the recently enacted Illinois House Bill 4023 (the "Act"), which is due to take effect on January 1, 2006. The Act imposes criminal penalties on retailers of video games, including many of VSDA's members, for selling or renting to persons under age 18 what the Act defines as "violent video games" including depictions or simulations of "human-on-

human violence in which the player kills, seriously injures, or otherwise causes serious physical harm to another human." (Sec. 12A-10(e))

6. The Act also requires the labeling on the front face of games so described as "violent video games" or "sexually explicit video games" with a solid white "18." Retailers employing Point of Sale electronic scanning technology would be required to program the scanner to prompt clerks to check the ID of the purchaser or renter of such games, and the Act prohibits the use of self-service checkout mechanisms for the purchase or rental of such games. (Secs. 12A-15, 12A-25, 12B-15, 12B-25)

7. The Act also would require every video game retailer to post in its store signs informing customers that the video game rating system of the Entertainment Software Ratings Board ("ESRB") is available to aid in the selection of a game. (Sec. 12B-30) The Act also requires retailers to provide information explaining such rating system to customers on request. (Sec. 12B-35).

8. I have been involved in attempting to determine what the Act means and what VSDA's members must do to be in compliance with the Act. In this regard, I have worked with VSDA members directly, including members in the Northern District of Illinois, all of whom fear prosecution by State and County officials based on the Act's prohibitions.

9. In order for VSDA's members to comply with the Act, they must review their present inventories and attempt to determine which video game titles might come within the coverage of the definition of "violent video games" in the Act. Moreover, retailers and distributors must make guesses about the content of video games not yet released but which, by custom and trade practice, are ordered in advance of the release of the game. In internal consultations among VSDA's leadership and members, it has become apparent that no consensus

exists or could reasonably be deduced as to the scope of this definition's reach and no clear criteria in the Act provide a useful guide to the decision-making called for by the Act.

10. In particular, while the VSDA and its member retailers and distributors can try to guess which video games might be covered by the Act, it is impossible for VSDA's members to determine with any degree of certainty whether any number of the titles in their inventories are covered by the Act's definition of "violent video games" because, in the context of virtual depictions featured in most games, the language used in the act to define "violent" is vague and without definite meaning. For example, a game is defined in the Act as "violent" if it includes depictions or simulations of the killing of a human by another human or the "depictions of death" resulting from human-on-human action. In many games currently in retailers' and distributors' inventories, a player may engage in combat with a human form, may knock down the computer-generated form and soon thereafter advance beyond the depiction of the downed combatant. In this example, there is no reasonable way for a retailer or distributor to determine whether the combatant is "killed" or whether a "death" is depicted.

11. In a medium in which all depictions are computer generated and animated, even the meaning of "human-on-human" as that term is used in the Act's definition of "violent" is without definite meaning. Many games do not identify the simulated form of the player, and some do not depict the player at all. Combatants, including the player's fictional character and the opponent, in many games are more or less mythological, often possessed with "powers" not possessed by humans. There is no reasonable way for VSDA and its members to determine whether a depiction in a computer game involves "human-on-human" violent content, particularly given that many video games include animated, extra-terrestrial, and fantasized "human" forms with superhuman powers.

12 The Act also forces retailers to create labeling for certain games based solely on the content of the games in a manner that is inconsistent with current practices and exposes retailers to criminal sanctions for errors they may commit in determining which games require the "18" label and which do not. At present, video game publishers use the entirety of a video game's limited packaging to convey information about the content of the game – including the game's ESRB rating and content descriptors. The required labels – which are quite large relative to the total size of game packaging – will obscure and eliminate important product information, marketing and operational messages which appear on the game's label or packaging. These messages represent important speech for retailers and convey information and messages about the product which retailers would not willingly eliminate from the games, but for the sanctions imposed by the Act.

13 The Act also requires retailers to display signs of significant size conveying notice that a video game ratings system is available to aid in the selection of a game. But most retailers already have signage and other notices on display which convey, in a manner chosen by the retailer, specific information about the existence and details of various relevant ratings systems (e.g., movies, music, and video games). These messages are chosen by the retailer as appropriate for his customers and his stores, and it would be a sizeable burden – not to mention an infringement on retailers' chosen methods of communicating information to their customers – for retailers to replace their current inventories of signage with new signs that meet the Act's specific demands. Moreover, the Act's requirement that signs be placed at multiple locations throughout each retail establishment – where games are displayed for sale or rental, at any information desk, and at points of purchase (Sec. 12B-30) – will be extremely burdensome, as this requirement is not tailored to the size or nature of the establishment. Indeed, in many retail

stores, video games are but one of many categories of products offered for sale. The Act's requirement that specified signs must be posted at points of purchase imposes a significant burden upon retailers irrespective of whether most of the retailer's customers are purchasing or have any interest in video games.

14. Most all VSDA retail members utilize computer-based systems for keeping records of sales and rentals of video games and substantial numbers use some form of data recognition from scannable labels in these "Point of Sale" (POS) systems. These systems vary widely and many are not amenable to programming by the retailer. Thus, the Act would require some retailers in Illinois to purchase program modules from third parties to achieve the "prompts" required by the Act. In fact, in many cases the Act would require new programs to be written by the vendor of the POS system or a third party.

15. The Act prohibits the use of a self-scanning mechanism in the sale or rental of a covered game. Self-scanning systems are perceived by many consumers to increase the speed and efficiency with which they complete their purchases. Consumers often bring a variety of products to a self-scanning system, most of which are permitted by the Act to be checked out by consumers using the self-scanning system. Illinois video retailers are confident that many consumers, confronted by a prohibition of self-scanning for certain games, would simply choose to not purchase that game or games. When confronted with an item that cannot be scanned, retailers reasonably believe a substantial number of consumers will simply set the item aside rather than have to void the scanned items, gather all of their intended purchases again, and stand at the end of a regular checkout line to wait their turn a second time. This is an effect of the Act feared by retailers as it would burden them and their customers, even where the purchaser is an adult.

16. The affirmative defenses provided in the Act do not reduce the burden the Act imposes on retailers. First, the Act fails to define the class of employee referred to as a "retail sales clerk." I know of no generally accepted standards for determining when an employee or owner is acting as a retail sales clerk. For example, retailers are left with no guidance as to whether the affirmative defense is available to a store manager assisting a customer at the check-out counter. Second, retailers will never be able to determine whether a retail sales clerk had "complete knowledge" that the purchaser or renter was a minor because the meaning of "complete knowledge" is not defined. Thus, to avail themselves of this affirmative defense, retailers would face the unreasonable burden of proving the completeness of the knowledge of the clerk and that the clerk acted with the specific intent to sell or rent the game to a minor.

17. Ultimately, VSDA's members will be unable to determine with any certainty whether each individual game may be sold or rented to a person under the age of 18. This is so not only because of the Act's vague terms, but also because video games often contain more than 50 hours of game play, much of which is non-linear or accessible only to advanced game players. Thus, unlike a movie, which can be viewed in its entirety by a retailer or distributor, most video games are not susceptible of such review.

18. VSDA has long supported widespread use of the ESRB rating system, encouraging all retailers not only to use it (by voluntarily choosing to not rent or sell AO-rated games to minors at all, and only to provide minors with M-rated games with parental consent), and to prominently display consumer information concerning the ESRB rating in their stores.

VSDA and its members have together invested thousands of dollars developing awareness of the ESRB rating system and seeking its acceptance by consumers as a useful guide, attempting to give it the same level of public awareness and acceptance as is enjoyed by the familiar Motion

Picture Association of America's ratings for movies. The Act compels retailers to speak in a manner inconsistent with the fundamental message they seek to advance. For example, video retailers displaying a T-rated video game are conveying to consumers that, according to the ESRB's definitions, the game has "content that may be suitable for ages 13 and older."

Notwithstanding this, the Act also requires retailers to label certain T-rated games with an "18" – indicating that such games are suitable only for adults, and will not be sold or rented to those ages 13-17. These two messages are fundamentally at odds with each other, and retailers are thus concerned about the confusion this will cause their customers.

19. Compounding this confusion, the Act establishes an affirmative defense in cases where the game came with a T rating. Thus, a violent T-rated video game must be labeled "18" even though there is an affirmative defense for T-rated games. All the while the ESRB and the retailer may be also trying to tell customers that the content may be perfectly suitable for 13-17-year-olds, notwithstanding the opinion of the Illinois legislature concerning whether the content is suitable for this age group.

20. In addition to forcing retailers to communicate a message inconsistent with their own, the Act takes the language of the ESRB used to rate games (EC, E, E10+, T, M or AO) and gives it special meaning under penalty of law. The ESRB applies its ratings solely as an informational tool for retailers and consumers. The Act takes the ESRB ratings and gives them new meaning, underpinned by a system of rewards (immunity from prosecution if the ESRB chooses to apply certain ratings) and punishments (lack of immunity if other ratings are selected), such that any video game that the ESRB has not rated EC, E, E10+, or T, carries with it the risk of greater potential for criminal liability and the stigma associated with such potential.

21 The Act takes private, voluntary informational communication and converts it into the basis for creating an "adult video game industry." As I understand it, only twenty games rated by the ESRB carry the "AO" (or "Adults Only") rating. Under the Act, innumerable M-rated games, T-rated games, and perhaps even E10+ and E-rated games (depending upon whether "human-on-human" violence is determined to include cartoon depictions of human-like creatures) would be lumped under an "18" label, which consumers may well regard as the equivalent of an ESRB "AO" label given by the State of Illinois.

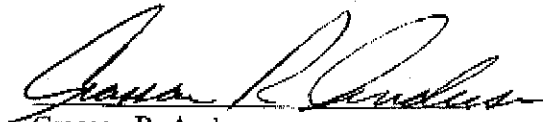
22. Moreover, an "18" label is a symbol commonly used to communicate that certain materials are sexually explicit and intended only for adult audiences (*e.g.*, "Must be 18 to Enter," "No One Under 18 Admitted"). VSDA members in Illinois are concerned that requiring an "18" on all games covered by the Act will create such stigma that M-rated, T-rated, or even lower rated games carrying the "18" label will no longer be perceived as products which simply contain material some parents might find unsuitable for their children (like R-rated or PG-13-rated movies) and instead be treated as though they were sexually explicit adult products – even pornography. Indeed, some adult consumers, wary of being seen carrying an "18" product to the checkout counter, will be chilled in their efforts to acquire it. Because of the serious liability visited upon retailers for failing to guess correctly as to scope of the definition of "violent," retailers in Illinois feel sure they would have no choice but to carve out a broad zone of protection and sweep into the "18" category video games they do not reasonably believe any parent would object to, but which nevertheless might fit a prosecutor's interpretation of Section 12A-10(e).

23. As a rule, many video retailers in Illinois who rent video games do so under contractual agreements they enter into with their adult customers. Under these agreements, the

adult customer may designate other family members, including their children, as authorized by the parent to rent movies or games using the parent's account. Many of these contracts allow the parent to designate, for each child authorized to rent, what ratings limitations, if any, the parent chooses to place on the child. This Act burdens retailers and their customers (who are consenting parents under these agreements) by obligating the retailer to disregard the parent's wishes and instead restrict their children to the "18" rating imposed by the state.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on August 13, 2005.


Crossan R. Andersen

TD

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ENTERTAINMENT SOFTWARE
ASSOCIATION, VIDEO SOFTWARE
DEALERS ASSOCIATION, and
ILLINOIS RETAIL MERCHANTS
ASSOCIATION,

Plaintiffs,

vs.

ROD BLAGOJEVICH, in his official
capacity as Governor of the State of
Illinois; LISA MADIGAN, in her official
capacity as Attorney General of the State of
Illinois; and RICHARD A. DEVINE, in his
official capacity as State's Attorney of
Cook County,

Defendants

FILED
AUG 23 2005

**MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT**

No. 05 C 4265

Judge Kennelly

DECLARATION OF TED PRICE

Pursuant to 28 U.S.C. § 1746, I, Ted Price, under penalty of perjury state as follows:

1 I am the President and CEO of Insomniac Games, Inc. and have served in this capacity since I founded the company in 1994. My duties outside of those regularly associated with running a company include directly overseeing creation and development of video games for the Playstation game console, Playstation 2 game console and the Playstation 3 game console.

2. Insomniac Games is headquartered in Burbank, California and is an independent video game developer employing approximately 150 people. Over the past 11 years Insomniac has created and developed games for the Playstation game console and the Playstation 2 game console, most notably the *Spyro the Dragon* series on the Playstation and the *Ratchet and Clank*

series on Playstation 2. The games Insomniac has created have sold close to 19 million copies worldwide to date. The company is currently developing another *Ratchet* video game for the Playstation 2 to be released in 2005 and an untitled Playstation 3 video game to be released in 2006.

3. Even though I am President and CEO of Insomniac, I am heavily involved in the design of our games, serving as creative director and executive producer for most of our titles. I am also the chairman of the Academy of Interactive Arts and Sciences ("AIAS") which was founded to recognize artistic and technical excellence in computer and video games. This excellence is recognized at the Interactive Achievement Awards hosted every year by the AIAS. This event is roughly the equivalent of its counterparts in the motion picture, television and recording industries. These peer-based awards are given in a wide variety of categories, some based on game content and others on craft (such as Outstanding Achievement in Sound/Music and Outstanding Achievement in Character or Story Development).

4. The Academy and other organizations within the video game industry like the International Game Developers Association ("IGDA") of which I am also a member, serve to remind people that computer and video games constitute artistic expression. Today's video games have storylines, characters, art, animation, sound effects and music that rival motion pictures and other forms of entertainment in terms of quality and complexity. As do movie directors and book authors, game creators not only strive to entertain their audiences but to communicate messages and ideas including a variety of political, social and moral commentary. For example, *Tom Clancy's Rainbow Six 3*, a game discussed in this declaration, communicates the same patriotic ideals and outlook on US national security put forth in Tom Clancy's novel *Rainbow Six*.

5. Because of my current positions and because of my experience as an active member of the video gaming community I have extensive knowledge of the video game industry including knowledge of how computer and video games are developed, published and distributed. Throughout my life I have also been an avid player of computer and video games. In my lifetime I estimate that I have played over 1,000 computer and video games and that I have spent thousands of hours playing computer and video games. I am familiar with the design, storylines, character development, and expressive elements of a wide range of computer and video games. In particular, I am familiar with the following games, which I understand have been submitted to the Court along with a videotape of representative game play:

Resident Evil 4

Jade Empire

God of War

Full Spectrum Warrior

Tom Clancy's Rainbow Six 3

THE STATUTE

6. On July 25, 2005 Illinois enacted into law House Bill No. 4023 (the "Act") which amends the Illinois Criminal Code of 1961 by changing Sections 11-21 and by adding Articles 12A and 12B. The law is due to take effect on January 1, 2006.

7. While the Act defines "violent" games as those that include "depictions of or simulations of human-on-human violence," it can be very difficult to determine what is "human" in many of today's games. Many games feature characters that are humanoid but not "human." For example, zombies, mythological creatures, mutants, and humanoids that transform into other beings may all look very similar to humans but not satisfy the definition of the word human. As

discussed below, technically, three of the games in this declaration, *Resident Evil 4*, *Jade Empire* and *God of War* have very little or *no* human-on-human violence.

8. The Act leaves it to each retailer's discretion to determine what is and isn't human-on-human violence. Retailers will have to define for themselves what constitutes "human" when deciding whether or not to restrict the sale of a game. Furthermore since the Act also declares that *simulations* of human-on-human violence are covered, this broadens the likelihood that retailers will further expand, in a very subjective way, the catalog of games that fall under the Act.

9. This Act will result in many games rated by the ESRB as potentially suitable for teenagers and children being relabeled as "18." Indeed, the labeling provision apparently would cover any video game that meets the statutory definition of "violent" including games presently rated "E 10+" and "T." For example, I believe that games such as *Minority Report* (T) and *Simpsons Road Rage* (T) could be viewed as falling under the definition of "human on human" violence. For many categories of games this will result in a decreased demand at retail. The reduced demand is likely to create a domino effect where distributors choose not to distribute certain categories of games and publishers respond by curtailing development of games that may possibly fall under the Act's prohibitions. This will require that game developers and creators alter and/or restrict their creative expression within the games they make.

10. From my perspective as a game designer and developer, with this Act in place I would feel very uncomfortable about including even cartoon violence in our games. The kind of cartoon violence to which I refer is exhibited in Insomniac Games' *Ratchet and Clank* series which has garnered a T rating from the ESRB denoting a game that may be appropriate for children 13 and over. The main characters in *Ratchet and Clank* are not human. But these and

other humanoid characters in this series may be misinterpreted by some retailers as human. These characters "kill" each other, are "killed" by the main character and occasionally "dismembered." Furthermore, even though the *Ratchet and Clank* games are not "realistic," they could be considered "simulations" of human-on-human violence which would also be prohibited by the Act. Because retailers are responsible for determining what constitutes "human on human" violence it is possible some store owners may decide that our games fall under this Act's prohibitions and refuse to sell them to minors. As a result this Act could have an adverse affect on our business and severely constrain our designers' artistic freedom and ability to express themselves in our games.

POTENTIAL APPLICATION OF THE ACT TO SPECIFIC GAMES

Resident Evil 4

11. *Resident Evil 4* is a video game developed by Capcom Production Studio 4 and published by Capcom. The ESRB gave *Resident Evil 4* a rating of "Mature" or "M," meaning that it may be suitable for ages 17 and older. Capcom publishes the game for Nintendo's Gamecube.

12. *Resident Evil 4* continues a saga begun in earlier *Resident Evil* games. In previous games a sinister corporation called Umbrella had manufactured a virus which turned humans into zombies and mutants. We learn in the beginning of *Resident Evil 4* that the United States government has issued a suspension decree to Umbrella, crashing its stock and driving it out of business.

13. The main character in the game is a government agent named Leon Kennedy. At the start of the game he is tasked with rescuing Ashley, the kidnapped daughter of the American president. Leon follows clues to a small rural village in Spain and begins his search.

14. To summarize: the player eventually discovers that a character named Osmund Saddler has discovered an ancient parasite called La Plagas. This parasite when injected into humans will turn them into zombies or transform them into even more vicious and powerful monsters. The catch is that Saddler, himself a mutant, can exert his will over those that are infected and use them for his own nefarious purposes. Saddler himself has not kidnapped Ashley; rather an old enemy of Leon's has kidnapped her to curry favor with Saddler so that he can steal Las Plagas (an attempt which is later thwarted). Saddler's intent is to use Ashley to extort money from the United States government. But this is not the main focus of Saddler's actions as the player will later find out.

15. Several hours into the game, the player rescues Ashley but his attempts to return her to the United States are hindered by Saddler and his army of zombies and mutants. The player, while doing his best to protect Ashley uncovers more and more layers of Saddler's complex scheme to manufacture and spread Las Plagas for his own personal gain. Before he is able to return Ashley to the United States Leon must confront and kill Saddler. When the player confronts Saddler in a climactic battle Saddler transforms into a monstrous being – something that in no way resembles a human. On the player's victory the main game ends and Leon returns Ashley to the United States.

16. Throughout the game, the player is constantly subjected to plot twists, mysteries to be solved and evolving relationships between the main characters. While the game is linear (in that there is no branching storyline) the player has to solve puzzles and manage a complex inventory to have any hope of succeeding.

17. The player's character *may* be interpreted as killing humans in the game though it is never clear. The majority of the enemies in the game are zombies and mutants infected by Las

Plagas. These characters have corpses which dissolve a few seconds after dropping to the ground. There are a few instances where there appear to be chainsaw-wielding humans whose corpses do not disappear. Their heads are completely covered by canvas sacks making it impossible to tell what they really are. There are also what appear to be humans who attack the player at various points of the game who also have corpses that do not disappear. But they act and look exactly like the zombies and mutants who populate most of the game's areas. The inference is that these people have also been infected by Las Plagas and are in the process of becoming full-fledged zombies but that the infection is not far enough along to have fully converted them.

Jade Empire

18. *Jade Empire* is a video game developed by Bioware Corporation and published by Microsoft Corporation. The ESRB gave *Jade Empire* a rating of "Mature" or "M," meaning that it may be suitable for ages 17 and older. Microsoft publishes the game for its Xbox console.

19. The story of *Jade Empire* is complex and has different paths which the player may choose to follow. There are many opportunities in the game for the player to choose between good, neutral and evil actions that will change the course of the story, change the way other characters in the game react to the player's character and change the items and skills available to the player.

20. The story itself is heavily influenced by Chinese mythology and wuxia (martial-chivalric stories). It takes place in a mythical kingdom called the Jade Empire which is ruled by Emperor Sun and his younger brothers Prince Li and Prince Kin. Before the game begins the kingdom suffers a terrible drought and the Emperor, seeking to end the drought obtains the heart of the Water Dragon, Goddess of Life. For whoever possesses the heart of the Water Dragon

gains immense power and becomes immortal. While the Emperor indeed ends the drought he is corrupted by the power he has obtained and decides to become a god. His brothers Li and Kin attempt to stop him but the Emperor is too powerful. He turns Kin into a demonic slave named Death's Hand while Li flees and travels to the edge of the empire disguising himself as a benevolent martial arts master.

21. With the Goddess of Life unable to function, the gates to the underworld are closed preventing the spirits of the dead from being reincarnated in the afterlife. The empire begins to fill with the spirits of the dead (ghosts) who begin to go mad and attack the living. Even worse, to further strengthen his hold on the land, Emperor Sun builds an army of immortal golems powered by the enslaved souls of the dead.

22. The player's character begins as a student of Prince Li, now disguised as Master Li. Master Li trains the player to fight the spirits, bandits and demons and enlists the player in his own evil quest to steal the heart of the Water Dragon from his brother, though the player doesn't realize it at first. Throughout the game the player's character develops new skills, acquires many new items, gains followers and uncovers more and more of the back story. Much of what the player learns and acquires is a result of thousands of choices he must make throughout his travels. But ultimately he ends up battling and defeating Emperor Sun near the end of the game.

23. When the Emperor falls, Master Li obtains the heart of the Water Dragon and inherits its immense powers. Unfortunately for the player it is at this point that he discovers Master Li is just as evil as his brother. Master Li kills the player's character sending him to the spirit realm as a ghost. When the player wakes up in the spirit realm he finds that to return to the land of the living he must first unlock the gates to the Underworld. Eventually after a series of adventures as a spirit the player does return as a mortal and has a final showdown with Master

Li, now Emperor Li. When the player defeats the new Emperor he has two choices – one to rule the world with the evil Emperor the other to restore the world to a balanced state.

24. During the game the player's character fights and kills human bandits, ghosts, humanoid golems and demons of all types – some humanoid, some animal-like. The player himself becomes a spirit three quarters of the way through the game. Furthermore, since many of the humans in the game use magic spells, magical fighting abilities and even transform into other creatures the line between what is "human" and what isn't becomes further blurred. Indeed since the main character uses magic and even becomes a spirit at one point in the game, the player's character could be viewed as not "human" and thus not participating in human on human violence.

God of War

25. *God of War* is a video game developed and published by Sony Computer Entertainment America. The ESRB gave *God of War* a rating of "Mature" or "M," meaning that it may be suitable for ages 17 and older. Sony Computer Entertainment America publishes the game for Sony's Playstation 2 game console.

26. *God of War* takes place in ancient Greece. In this game the Greek gods of legend are real and interact with humans. The player's character is Kratos, a Spartan warrior who has taken on the task to kill the titular *God of War* Ares by opening Pandora's box. Along the way, he is provided assistance by Athena, Zeus, Artemis, Poseidon and Hades.

27. At the beginning of the game in a foreshadowing of future events, the player sees Kratos hurling himself off of a cliff for unknown reasons. Time shifts to three weeks before this event and a complex story unfolds in a non-linear fashion. The player finds out bits and pieces of Kratos' history through movies which play at the end of most game play segments.

28. The player eventually learns that Kratos at one time was a brutal but effective Spartan commander. Ignoring his wife and child, he led his army on countless conquests until he met his match against a barbarian army which was threatening Sparta itself. Kratos' army was being badly defeated until he called on the god Ares for help. Ares arrived and helped Kratos. Seizing an opportunity to gain greater power Kratos and his army began to serve the will of Ares. Under orders from Ares, Kratos and his army attacked a small village. Kratos and his men slaughtered all of the villagers but to his horror, Kratos realized that two of the victims of his rampage were his own wife and daughter. After this Kratos rejected Ares and vowed to seek forgiveness from the other gods for his crimes as well as to exact revenge on Ares for his deception.

29. We learn all of this in flashbacks throughout the game. But as the player begins his actual quests, we see Kratos struggling with his inner demons. In many of the game's movies, Kratos is frequently plagued by nightmares of his wife and child's deaths and nothing he does will erase their memories. Because of this he becomes singularly focused on eliminating Ares in the hopes of convincing the goddess Athena to aid him. During the game the player fights countless demons and other humanoid creatures who are terrorizing the human populace as he seeks revenge on Ares. He battles through ancient Athens and even journeys to Hades in his quest.

30. When Kratos finally succeeds in killing Ares it is a hollow victory. We learn that Athens will be rebuilt but that Kratos' nightmares will never cease. At this point, in the post-battle movies Kratos climbs a massive cliff and jumps to his death, bringing the story full circle to the beginning of the game. But the story doesn't end with Kratos' death. Athena rescues

Kratos and offers him god status and the throne of Ares. Kratos accepts and also finds out that he is actually the son of Zeus.

31. Throughout the game, Kratos executes combinations of physical attacks and magical attacks against enemies. While the game is primarily focused on combat, the player's character has an opportunity to find special items which increase his maximum health and magic. The game requires well thought out strategies in terms of using different combinations of physical and magical attacks effectively. Furthermore, the game is filled with logic puzzles which demand that players observe their environments carefully and experiment with different ways to traverse the environments. These logic puzzles generally do not involve combat and are non-violent.

32. The enemy characters in this game *resemble* humans in many cases but are also in many ways not human. Most are derived from Greek mythology. For instance, many of the characters in the game are well known gods or persona from Greek mythology who look like humans but are immortal or have god-like powers. Furthermore, some enemies have humanoid bodies with wings, some are shuffling zombies, others are skeletal warriors. The player's character can kill humans in very few areas of the game, but he is not directed to do so. Even more important, we find out at the end of the game that Kratos himself is a half-god. Therefore technically the player's character never directly participates in human on human violence in the game.

33. In several of the game's movies, the player will see women characters with exposed breasts. In one scene, Kratos is shown sitting at the side of a bed on which two bare-chested women are lying. The implication is that Kratos has had sexual relations with them. Yet this is an important scene in the story because it shows Kratos turning away from the temptations

of the physical realm to focus on his mission. In the scene Kratos states that wine and women could not distract him from the painful memories of the death of his wife and child. The game allows the player to choose to have Kratos engage in sex with the women characters although the sex is not portrayed on screen. Finally, there are several scenes in the game where Kratos confronts the Oracle of Athens. She wears a transparent shirt through which her bare breasts are visible – an historically relevant outfit.

Full Spectrum Warrior

34. *Full Spectrum Warrior* is a video game developed by Pandemic Studios and published by THQ Corporation. The ESRB gave *Full Spectrum Warrior* a rating of “Mature” or “M,” meaning that it may be suitable for ages 17 and older. THQ publishes the game for Microsoft’s Xbox console, Sony’s Playstation 2 and personal computers.

35. The game follows three squads of infantry troops through a series of missions fighting insurgents in a fictitious Middle Eastern city called Zekistan. Each squad has four members, a team leader, a rifleman, a grenadier and an automatic rifleman. These squads are not faceless soldiers – they have real personalities that emerge in their verbal responses to orders and in their repartee with each other. The squads work as a unit, covering each other, moving in formation

36. As a player you never take the place of any of the soldiers in combat. Instead you are a virtual commander giving your squads orders to move, take cover, provide covering fire and then fire on positions. In other words, while human characters are killed in the game, the player’s character never actually lines up an enemy in his sights and therefore never directly fights or kills other humans. The player gives commands to his squads and the squads carry

them out. The main focus of the game is on coordinating squads in an attempt to safely find the most strategic cover, outflank, and then defeat enemies.

37. There is a comprehensive training level at the beginning of the game which familiarizes players with necessary terms and tactics. Throughout the game, players are faced with more and more complex situations and must develop their abilities to command their squads effectively and choose the strategies that will minimize allied casualties. Furthermore, the player has to be aware of the different capabilities of each of his squad members and use them at the correct times. For instance, if a squad is pinned down by heavy enemy fire, the player can command his team leader to drop smoke grenades for a screen and then have his automatic rifleman provide covering fire while the team moves to a safer position, one by one.

Tom Clancy's Rainbow Six 3

38. Tom Clancy's *Rainbow Six 3* is a video game developed by Ubisoft Montreal and published by Ubisoft. The ESRB gave *Rainbow Six 3* a rating of "Mature" or "M," meaning that it may be suitable for ages 17 and older. Ubisoft publishes the game for Microsoft's Xbox console, Sony's Playstation 2, Nintendo's Gamecube, and mobile phones.

39. The story in *Rainbow Six 3* is related to that of the book *Rainbow Six* by Tom Clancy. In fact, the game's storyline was approved by Tom Clancy himself. In the game, as in the book, Rainbow Six is a shadow organization covertly supported by western governments. It is a secret anti-terrorist organization comprised mainly of American ex-special forces soldiers mixed with a few specialists from other nations. In the game, the player assumes the role of team leader, Ding Chavez, and gives orders to the rest of Chavez's four person squad.

40. The game takes place in 2007 as OPEC launches an oil embargo against the United States. But Venezuela breaks the embargo and begins shipping oil to the United States.

Terrorists who have apparently been counting on the embargo to weaken America's influence in the Middle East begin striking targets in America, South America and Europe. Rainbow Six is called in by the United Nations to stop the terrorists.

41. Juan Crespo, a Venezuelan philanthropist and pro-United States businessman bound for the presidency of Venezuela becomes the apparent target of the terrorists and the player's character must rescue him or his associates during two of the game's fourteen missions. Later in the game Crespo is elected president of Venezuela and we discover that he is actually behind the terrorist activities around the world. The player finds out that once Crespo became president, he had planned to stop the oil shipments to the United States and sell it on the black market, generating huge personal profits. Furthermore through his connections in the Middle East Crespo intended to cast the blame for the terrorist attacks on Saudi Arabia creating a war between the United States and the Saudis. Assuming that the war would devastate one or both countries, Venezuela, a major oil producer, would become even more powerful. During the later missions in the game, the player and his team must continue to disrupt the terrorist activities, and track down and then kill Crespo.


42. *Rainbow Six 3* is a realistic tactical simulation in that the player has to think through each situation to succeed. Because team members can be killed or incapacitated by a single bullet, they cannot simply run into a room with guns blazing. The player must command his team members to covertly move to locations, open doors with varying levels of aggressiveness, and secure hostages among other things, by either using the command system accessed through the joypad or by simply issuing verbal commands into a headset. The commands used are fairly complex and usually include a series of orders which must be executed in sequence such as "open, flash and clear." This means "open the door, deploy a flash grenade

and clear the room of hostiles.” Since many of the situations presented to the player involve rooms or areas with multiple entrances, to be effective the player has to make sure that all team members are acting in concert – bursting in from different directions simultaneously to gain the advantage of surprise.

43. While most of the missions do involve killing terrorists, the objectives of the missions themselves are varied. Most of the missions have hostage rescue as the main goal. In these missions, killing a hostage or allowing a hostage to be killed will cause the player to fail. Other missions involve defusing bombs or preventing nerve gas from being deployed. Losing team members during missions makes the game even more difficult so players have to be very careful to protect their squad mates by collecting as much data as possible about their surroundings and issuing intelligent commands.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on August 12, 2005.



Ted Price

TD

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ENTERTAINMENT SOFTWARE
ASSOCIATION, VIDEO SOFTWARE
DEALERS ASSOCIATION, and
ILLINOIS RETAIL MERCHANTS
ASSOCIATION,

Plaintiffs,

vs.

ROD BLAGOJEVICH, in his official
capacity as Governor of the State of
Illinois; LISA MADIGAN, in her official
capacity as Attorney General of the State of
Illinois; and RICHARD A. DEVINE, in his
official capacity as State's Attorney of
Cook County,

Defendants.

FILED

AUG 23 2005

AUG 23 2005

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

NO 05 C 4265

Judge Kennelly

DECLARATION OF DOUGLAS LOWENSTEIN

Pursuant to 28 U.S.C. § 1746, I, Douglas Lowenstein under penalty of perjury state as follows:

1. I am currently employed as President of the Entertainment Software Association ("ESA"). I have been the President of the ESA (formerly known as the Interactive Digital Software Association) since June of 1994.

2. The ESA is the only U.S. trade association exclusively dedicated to serve and promote the business and public affairs interests of companies that publish entertainment software used for video game consoles (such as Nintendo GameCube, Microsoft Xbox, and Sony Playstation 2), personal computers, wireless, and the Internet. One such interest that the ESA promotes is these companies' right to publish and distribute works of expression that are

protected under the First Amendment to the United States Constitution and similar provisions of the constitutions of the various States. The ESA's membership includes a number of entities that distribute and/or supply video games and related software to owners and operators of sales and rental outlets within the State of Illinois. Several of ESA's members, including Midway and Electronic Arts, have offices in Illinois.

3. As a result of my duties as President of the ESA, I have personal knowledge of the facts stated in this declaration

The ESRB Rating System

4. The Entertainment Software Rating Board ("ESRB") is a self-regulatory body established by the ESA to rate independently the content of interactive entertainment software for all platforms.

5. In 1994, the ESRB created a rating system for computer and video games. In a September 2000 report, the Federal Trade Commission ("FTC") called the ESRB rating system the "most comprehensive" of industry-wide media rating systems. See <http://www.ftc.gov/reports/violence/vioreport.pdf> ("FTC Report") at 37. Senator Joe Lieberman has called the ESRB system a model for other entertainment industries to follow.

6. The ESRB rating system was created as part of the industry's commitment to empower parents and other consumers to make informed decisions based on the general content and nature of games that they may buy, rent, or play. The rating system was designed to provide credible, reliable, and easily understood information about games to consumers. Like the movie rating system, the ESRB rating system is entirely voluntary; neither the ESA nor the ESRB requires video game publishers to submit their games to the ESRB for review, even though nearly all such publishers do so. The ESA is not, and has never been, involved directly or indirectly in the issuance of ratings by the ESRB, or in the ESRB's interpretations of its own

rating guidelines. The ESRB is funded in part by fees that it charges companies, which submit products to the ESRB for ratings.

7. The purpose of the ESRB rating system is to give parents and consumers information about the content of interactive entertainment software products so that they can make informed purchase and rental decisions. For any given game, the rating system offers both: (i) an actual rating in one of six categories for age appropriateness of content; and (ii) short descriptive phrases called "content descriptors" that give additional information about a game's content. A copy of the ESRB's rating system, including both the rating categories and the glossary of content descriptors, is attached as Exhibit A.

8. Under the ESRB system, games designated "EC" (Early Childhood) contain content that may be suitable for users age 3 and older, games designated "E" (Everyone) contain content that may be suitable for users age 6 and older, games designated "E10+" (Everyone Ten and Older) contain content that may be suitable for users age 10 and older, games designated "T" (Teen) contain content that may be suitable for users age 13 and older, games designated "M" (Mature) contain content that may be suitable for users age 17 and older, and games designated "AO" (Adults Only) contain content that the ESRB suggests should only be played by users 18 and older.

9. The ESRB rating system is dynamic, and is responsive to changes in the marketplace and to feedback from parents and customers. For example, the ESRB recently amended its rating system to add the new "E10+" rating, after consultations with academics and child development experts.

10. The ESRB also assists video game publishers and retailers in educating parents and other consumers about video games. Among other things, the ESRB makes available to

retailers – for example, via its website – standardized artwork for in-store signage and circulars that provide full and complete information about the rating system. Similarly, ESRB makes available to video game publishers standardized graphics for video game packaging, including the trademarked ESRB rating symbols and content descriptors, as well as labels alerting consumers to “check the ratings.”

11 These ESRB-distributed templates for labels, signs, and brochures are widely used by video game publishers and major retailers. ESRB has created designs and specifications for these materials based on its years of experience, and these materials reflect both the need to fully and accurately inform consumers about the rating system and the specific presentation needs of publishers and retailers (including, for example, “shelf strips,” and “kiosk signs”). These standardized materials, as used and adapted by video game publishers and retailers, represent the video game industry’s collective message of how best to inform and describe the ESRB system to parents and other customers. The value of these materials as an educational tool for parents is particularly important, as the FTC has found that parents are involved in 83% of video game purchases for minors. See FTC Report at 42.

The Illinois Statute

12. In my capacity as President of the ESA, I have remained informed about the issues and processes concerning the recently enacted Illinois House Bill 4023 (the “Act”), which was enacted into law on July 25, 2005. The Act is due to take effect on January 1, 2006.

13. The challenged provisions of the Act seek to censor expression in the video game medium because of the perceived effect of this expression on minors under the age of 18. Specifically, the Act makes illegal, and imposes penalties for, the rental or sale to those under the age of 18 of “violent” video games, defined as those games containing “depictions of or simulations of human-on-human violence in which the player kills or otherwise causes serious

physical harm to another human.” Act § 12A-10(e). Violation of this provision is a petty offense and subjects the offender to a \$1,000 fine.

14. The Act also makes it illegal to sell or rent a “sexually explicit” video game to anyone under the age of 18. Unlike the Act’s separate “obscenity as to minors” provisions, the Act’s restrictions on the sale or rental of “sexually explicit” video games would cover games with significant literary, artistic, or social merit.

15. Some of the content displayed by the video games created, published, distributed, and/or made available to the public by the ESA’s members may be deemed by law enforcement officials in the State of Illinois to meet the statutory definitions of “violent” and “sexually explicit” video games. Should the Act take effect, some retail establishments will likely sell or rent fewer copies of certain games because those games can no longer be sold or rented to minors under the Act, while other retailers may choose not to stock some games altogether – for adults or children – for fear of being subjected to the penalty for selling games that may be deemed covered by the Act to individuals under age 18. In either case, because retailers will restrict the sale of ESA members’ products in light of the Act, the Act will prevent the expression of ESA members from reaching a wide range of willing recipients.

16. The Act also requires any person who sells or rents any “violent” or “sexually explicit” video game to label the games “with a solid white ‘18’ outlined in black. The ‘18’ shall have dimensions of no less than 2 inches by 2 inches” and “shall be displayed on the front face of the video game package.” Act § 12A-25(a). The Act further requires that any “retailer who sells or rents video games shall post a sign that notifies customers” of the ESRB rating system. Act § 12B-30(a). The Act imposes very specific size, type and font requirements for the signs

Violations of any of these provisions are punishable by a fine of \$500 for the first 3 violations and \$1,000 for each subsequent violation Act §§ 12A-25(b); 12B-30(c), 12B-35(b)

17. The Act's labeling requirement will place significant burdens on ESA members and the sales of their products, and will result in consumer confusion. As video game publishers, ESA members use ESRB ratings and content descriptors, and the corresponding artwork, on their game packaging to inform customers about the rating system. A large black and white label that says only "18" would fail to provide the information contained in the existing rating system, and as a result will be confusing to customers. Moreover, the large "18" label may obstruct important information on the game packaging itself, including information about the game's ESRB rating. Instead of educating consumers about the content of the game – as the ESRB ratings already do – the labels mandated by the Act will primarily serve to stigmatize ESA members' games.

18. Furthermore, the Act's labeling requirement applies to any game that qualifies under the Act's definition of "violent" or "sexually explicit" video game, even if the game is also subject to the Act's affirmative defense for games rated "EC," "E," "E10+," and "T." In other words, the Act requires an "18" label to be placed on any game showing "violence" within the meaning of the Act, including many "T" and "E10+" games. The stigmatizing effect of the "18" label will therefore cover many games that otherwise would not be punishable under the Act. Thus, the Act's labeling provision is likely to have a chilling effect not only on "AO" and "M" games, but on other games as well, because some retailers may refuse to stock any game they deem "violent" or "sexually explicit," out of concern that games with the "18" label will trigger scrutiny from law enforcement officials.

19. In addition, the very specific size, font, and type requirements of the Act's signage provision conflict with the existing signs that the video game industry has already developed (and which are widely used) to inform consumers about the ESRB rating system. Thus, the Act would impose significant financial and expressive burdens on retailers concerning labeling and signage that are sure to affect the sales of video games in Illinois – even though publishers and retailers already provide comprehensive information to consumers.

20. Anticipating the Act's impact on the ESA members' First Amendment rights, the ESA attempted to work with the Assembly and Governor prior to the passage of the Act to implement less speech-restrictive, constitutional means of achieving the Legislature's goals.

21. To this end, on March 9, 2005, Gail Markels, representing the ESA, testified before the House Judiciary 1 Committee, which was considering H.B. 4023. Her testimony explained that the Act was unconstitutional, because it infringed on individuals' First Amendment rights. She also explained that the ESRB ratings system provides a reliable, independent guide for parents and consumers to determine whether they find particular video games suitable for children. Educating parents and the public about the ESRB rating system would be an alternative means of achieving the Legislature's goals, for, as the FTC has found, parents are involved in 83% of video game purchases for minors. See FTC Report at 42. An ESA representative testified to similar effect before the Senate Housing and Community Affairs Committee on May 3, 2005.

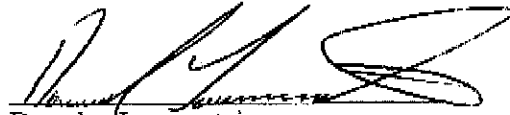
22. Through meetings, letters, and telephone calls, the ESA and its members communicated a similar message to Governor Blagojevich, who introduced the proposed legislation. We explained why the Act was unconstitutional, and we explained at length the comprehensive operation of the ESRB ratings system. We offered to work with the Governor

and other State officials to help educate consumers about the ESRB ratings system as a less speech-restrictive alternative to the Act

23. Both the Assembly and the Governor rejected these offers to work together with the ESA and members of the video game industry, and refused to consider less speech-restrictive alternatives to the Act's absolute prohibitions. Although informed of the Act's constitutional failings, the Assembly and the Governor nonetheless chose to enact the Act into law, rather than to explore less speech-restrictive means of achieving their goal of preventing certain computer and video games from being viewed by minors.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on August 12, 2005.



Douglas Lowenstein

Exhibit A

ESRB Game Ratings & Content Descriptors

The Entertainment Software Rating Board (ESRB) ratings are designed to provide information about video and computer game content, so you can make informed purchase decisions. ESRB ratings have two parts: **rating symbols** suggest age appropriateness for the game, and **content descriptors** indicate elements in a game that may have triggered a particular rating and/or may be of interest or concern.

To take full advantage of the ESRB rating system, it's important to check both the **rating symbol** (on the front of the game box) and the **content descriptors** (on the back of the game box).



Titles rated **EC - (Early Childhood)** have content that may be suitable for ages 3 and older. Contains no material that parents would find inappropriate.



Titles rated **E (Everyone)** have content that may be suitable for ages 6 and older. Titles in this category may contain minimal cartoon, fantasy or mild violence and/or infrequent use of mild language.



Titles rated **E10+ (Everyone 10 and older)** have content that may be suitable for ages 10 and older. Titles in this category may contain more cartoon, fantasy or mild violence, mild language, and/or minimal suggestive themes.



Titles rated **T (Teen)** have content that may be suitable for ages 13 and older. Titles in this category may contain violence, suggestive themes, crude humor, minimal blood and/or infrequent use of strong language.



Titles rated **M (Mature)** have content that may be suitable for persons ages 17 and older. Titles in this category may contain intense violence, blood and gore, sexual content, and/or strong language.



Titles rated **AO (Adults Only)** have content that should only be played by persons 18 years and older. Titles in this category may include prolonged scenes of intense violence and/or graphic sexual content and nudity.



Titles listed as **RP (Rating Pending)** - have been submitted to the ESRB and are awaiting final rating. (This symbol appears only in advertising prior to a game's release)

ESRB Content Descriptors

- **Alcohol Reference** - Reference to and/or images of alcoholic beverages
- **Animated Blood** - Discolored and/or unrealistic depictions of blood
- **Blood** - Depictions of blood
- **Blood and Gore** - Depictions of blood or the mutilation of body parts
- **Cartoon Violence** - Violent actions involving cartoon-like situations and characters. May include violence where a character is unharmed after the action has been inflicted
- **Comic Mischief** - Depictions or dialogue involving slapstick or suggestive humor
- **Crude Humor** - Depictions or dialogue involving vulgar antics, including "bathroom" humor
- **Drug Reference** - Reference to and/or images of illegal drugs
- **Edutainment** - Content of product provides user with specific skills development or reinforcement learning within an entertainment setting. Skill development is an integral part of product
- **Fantasy Violence** - Violent actions of a fantasy nature, involving human or non-human characters in situations easily distinguishable from real life
- **Informational** - Overall content of product contains data, facts, resource information, reference materials or instructional text
- **Intense Violence** - Graphic and realistic-looking depictions of physical conflict. May involve extreme and/or realistic blood, gore, weapons, and depictions of human injury and death
- **Language** - Mild to moderate use of profanity
- **Lyrics** - Mild references to profanity, sexuality, violence, alcohol, or drug use in music
- **Mature Humor** - Depictions or dialogue involving "adult" humor, including sexual references
- **Mild Violence** - Mild scenes depicting characters in unsafe and/or violent situations
- **Nudity** - Graphic or prolonged depictions of nudity
- **Partial Nudity** - Brief and/or mild depictions of nudity
- **Real Gambling** - Player can gamble, including betting or wagering real cash or currency
- **Sexual Themes** - Mild to moderate sexual references and/or depictions. May include partial nudity
- **Sexual Violence** - Depictions of rape or other sexual acts
- **Simulated Gambling** - Player can gamble without betting or wagering real cash or currency
- **Some Adult Assistance May Be Needed** - Intended for very young ages
- **Strong Language** - Explicit and/or frequent use of profanity
- **Strong Lyrics** - Explicit and/or frequent references to profanity, sex, violence, alcohol, or drug use in music
- **Strong Sexual Content** - Graphic references to and/or depictions of sexual behavior, possibly including nudity
- **Suggestive Themes** - Mild provocative references or materials
- **Tobacco Reference** - Reference to and/or images of tobacco products
- **Use of Drugs** - The consumption or use of illegal drugs
- **Use of Alcohol** - The consumption of alcoholic beverages
- **Use of Tobacco** - The consumption of tobacco products
- **Violence** - Scenes involving aggressive conflict

Additionally, online games that include user-generated content (e.g., chat, maps, skins) carry the notice **"Game Experience May Change During Online Play"** to warn consumers that content created by players of the game has not been rated by the ESRB.

ESRB Helps Parents Choose the Right Games for Their Families

The ESRB rating system is designed to give parents the information they need to evaluate a computer or video game before making a purchasing decision. The ratings are not meant to recommend which games consumers should buy or rent or to serve as the only basis for choosing a product. Rather, parents should use the ESRB ratings in conjunction with their own tastes and standards and their individual knowledge about what's best for their kids.

ESRB recommends that parents learn about games before making a purchasing decision. Game reviews printed in newspapers and publisher web sites can be excellent sources of information. To search for games that are appropriate based on age categories and content, use our online ratings [search feature](#).

ESRB also urges parents to talk with their children about their favorite games. Playing the games with your children helps stimulate those discussions, and playing games as a family can also be a fun way to spend time together.